



December 2, 2016

National Freedom of Information Officer
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
E-mail: hq.foia@epa.gov

SUBMITTED VIA ONLINE SUBMISSION FORM

RE: Freedom of Information Act Request – Treated article exemption and neonicotinoid coated seeds

To the National Freedom of Information Officer:

The Center for Food Safety (CFS) is a 501(c)(3) nonprofit organization that addresses the impacts of our current industrial food production system on human health, animal welfare, and the environment. Consistent with this mission and pursuant to 40 C.F.R. Part 2 and the Freedom of Information Act, 5 U.S.C. § 552. On behalf of CFS, I, Amy van Saun, request the following information:

Any and all documents or communications relating to crop seeds treated or coated with any of the following chemicals: acetamiprid, clothianidin, imidacloprid, or thiamethoxam (hereinafter, “neonicotinoids”), including but not limited to the subtopics specifically described below:

- 1. Any and all documents or communications since Jan. 1, 2003, relating to EPA’s implementation or interpretation of the Treated Article Exemption, 40 C.F.R. § 152.25(a), with regard to its application to crop seeds treated or coated with neonicotinoids.**
- 2. Any and all documents or communications since Jan. 1, 2003, related to any determination that neonicotinoid-coated crop seeds are or are not subject to regulation as pesticides under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 *et seq.*, (FIFRA).**
- 3. Any and all documents or communications since Jan. 1, 2003, related to any agency determination that neonicotinoid-coated crop seeds as a class or as a whole do or do not cause unreasonable adverse effects on the environment.**

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- 4. Any and all communications since Jan. 1, 2003, with any pesticide registrant, applicant for registration, or potential applicant for registration, or with any other persons or entities regarding the application or scope of the Treated Article Exemption with respect to neonicotinoid-coated crop seeds.**
- 5. Any and all documents related to, or communications with, any federal, state or tribal pesticide regulators regarding inspections or investigation of incidents involving treated seeds, particularly neonicotinoid treated seeds, and reported bee kills incidents that have occurred since Jan. 1, 2012;**
- 6. Any and all communications to or from the New York State Department of Environmental Conservation or any other New York State official, since Jan. 1, 2005, with respect to that state's regulation of the clothianidin seed coating product known as Poncho 600, including, but not limited to, possible Federal preemption related to New York's rejection of a proposed registration for Poncho 600.**

“All documents or communications” includes but is not limited to all correspondence, minutes, memoranda, communications, e-mails, reports, maps, plans, drawings, databases, phone notes and/or any other documents whatsoever created by, received from, or given to the agency, companies, or other regulators. This request includes all documents that have ever been within your custody or control, whether they exist in agency “working,” investigative, retired, electronic mail, or other files currently or at any other time.

CFS requests this information in light of the President's “Memorandum for the Heads of Executive Departments and Agencies” dated January 21, 2009, which states:

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails...In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public. All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA. The presumption of disclosure also means that agencies should take affirmative steps to make information public.

Exec. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,683 (Jan. 21, 2009). This request is being sent to the EPA FOIA officer with the understanding that it will be forwarded to other officers, offices, or departments with information pertinent to this request.

REQUEST FOR FEE-WAIVER

CFS requests that pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), EPA waive all fees in connection with the procurement of this information. As demonstrated below, the nature of this request meets the test for fee waiver as expressed in the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A)(iii).

The factors EPA must consider in deciding upon a fee waiver request are laid out in 40 C.F.R. § 2.107(l)(2), and those relating to a significant contribution to public understanding of the operations or activities of the government can be summarized as follows:

- (i) Whether the subject matter of the request concerns the operations or activities of the government.
- (ii) Whether the disclosure of the information will likely contribute to an understanding of the subject by the general public.
- (iii) Whether disclosure will contribute to a reasonably broad audience of persons interested in the subject.
- (iv) Whether the contribution to public understanding is significant.

40 C.F.R. § 2.107(l). These factors are to be balanced against one another; no one factor is determinative. *See Friends of the Coast Fork v. U.S. Dep't of Interior*, 110 F.3d 53, 55 (9th Cir. 1997).

The other requirements in the regulations—related to whether the requester has a commercial interest that outweighs a public interest motivation—are not applicable to CFS and this request. Under FOIA, a commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood. *See, e.g.*, OMB Fee Guidelines, 52 Fed. Reg. 10017-18; *see also* 40 C.F.R. § 2.107(b)(1). Such interests are not present in this request. CFS does not seek information from EPA for commercial gain or interest. As a 501(c)(3) nonprofit organization, CFS has no commercial interest in EPA's regulation or exemption of treated articles and in particular crop seeds coated with neonicotinoids.

In deciding whether the fee waiver criteria is satisfied, CFS respectfully reminds EPA that FOIA is inclined toward disclosure and that the fee waiver amendments were enacted to allow further disclosure to nonprofit, public interest organizations. *See* 132 Cong. Rec. S. 14270-01, (statement of Sen. Leahy) (“[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information.”). Furthermore, the Ninth Circuit Court of Appeals has interpreted this fee waiver section broadly, holding that the section “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy).

I. The Present Disclosure is in the Public Interest Because it Will Significantly Contribute to Public Understanding of the Operations or Activities of Government.

The requested disclosure will contribute to public understanding of the operations or activities of the government. 5 U.S.C. § 552(a)(4)(A)(iii).

A. The subject of the disclosure concerns “the operations and activities of the government.”

The requested information pertains to EPA’s regulation of pesticides under FIFRA and specifically its regulation of neonicotinoid-coated seeds and the application of the “treated article” exemption to those seeds. Because EPA is responsible for regulating insecticides, this request regarding information about the Agency’s application of an exemption from regulation to neonicotinoid-coated crop seeds relates to operations and activities of the government. This disclosure will demonstrate to the public at large how EPA regulates insecticides, in particular neonicotinoid-coated seeds, how and why it exempts certain pesticides from registration, how it communicates these policies with the public and regulated community, and how it works with state and tribal regulators on the issue of neonicotinoid-coated seeds and bee kills, which directly relates to the operations and activities of the government.

B. The disclosure is likely to contribute public understanding.

As discussed in the previous section, the present disclosure will provide the public a better understanding of how the EPA analyzes the use and potential harm of insecticides, in particular neonicotinoids used to coat seeds, in fulfillment of its regulatory duties, including communications it has with interested parties and other regulators during that process. More specifically, the present disclosure will provide the public with an understanding of how EPA analyzes the character and potential adverse impacts from a certain class of insecticides (seeds coated in neonicotinoids), how EPA applies and enforces its exemption from regulation for “treated articles,” and how EPA communicates that exemption and its scope to the regulated entities who manufacture the insecticide products. It is essential for members of the public, including consumers, farmers, beekeepers, and other public interest organizations, to better understand how EPA interprets and applies its exemptions from FIFRA requirements for “treated articles” and its understanding of the potential impacts from seeds coated with neonicotinoids. The requested records will meaningfully inform the public about these government operations or activities in a way not currently available in the public domain. *See* 40 C.F.R. § 2.107(l)(2)(ii).

CFS is a non-profit organization that informs, educates, and counsel the public—via legal action, our website, our True Food Network, books and reports, and our monthly e-newsletter, *Food Safety Now!*—on the harm done to human health, animal welfare, and the environment by industrial agriculture. For example, CFS has authored several reports and fact sheets regarding

neonicotinoids.¹ CFS also submitted comments on EPA's Preliminary Pollinator Assessment to Support the Registration Review of Imidacloprid.² Accordingly, CFS is an effective vehicle to disseminate information on pesticides and herbicides, and specifically on EPA's regulation of crop seeds coated with neonicotinoids and their impact on human health, animal health, and the environment.

Simultaneously, this FOIA will help CFS fulfill its well established function of public oversight of government action. Public oversight of agency action in particular is a vital component in our democratic system and is the bedrock upon which FOIA stands.

C. The disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject.

This disclosure will contribute to the understanding of a reasonably broad audience of persons interested in EPA's regulation of neonicotinoid-coated seeds and exemption as "treated articles" from FIFRA's registration and labeling requirements, as well as the potential harms of these seeds on the environment, including pollinators. 40 C.F.R. § 2.107(l)(2)(iii). CFS is a member-oriented non-profit organization with over 775,000 members that works to address the impacts of the food system on human health, animal welfare, and the environment. Through nearly two decades of involvement in environmental litigation and policymaking as it relates to food and pesticides, CFS has demonstrated its ability to take technical information provided by government agencies and distill it into a format that is accessible to the public. CFS employs science and policy experts³ who have analyzed FOIA; National Environmental Policy Act (NEPA); Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); and other environmental and scientific reports for their entire careers. CFS puts out reports on pesticides, genetically engineered foods, food and feed additives, and other topics that tend to be difficult for the layperson to understand without professional assistance.⁴ As noted above, CFS has published many fact sheets and reports for its members and the public on the topic of neonicotinoid insecticides.⁵ CFS also facilitates members' ability to confront agency inaction, such as the

¹ Center for Food Safety, *Neonicotinoid Study Index*, <http://www.centerforfoodsafety.org/issues/304/pollinators-and-pesticides/fact-sheets/3683/neonicotinoid-study-index>; Center for Food Safety, *Pollinators & Pesticides* Fact Sheet Aug. 2016, http://www.centerforfoodsafety.org/files/pollinatorspesticides-2016_fact-sheet_82548.pdf; Center for Food Safety, *Water Hazard: Aquatic Contamination by Neonicotinoid Insecticides in the United States* (Sept. 16, 2015), <http://www.centerforfoodsafety.org/issues/304/pollinators-and-pesticides/reports/4048/water-hazard-aquatic-contamination-by-neonicotinoid-insecticides-in-the-united-states>; Center for Food Safety, *Hidden Costs of Toxic Seed Coatings*, Fact Sheet June 2015, http://www.centerforfoodsafety.org/files/neonic-factsheet_75083.pdf; Center for Food Safety, *Heavy Costs: Weighing the Value of Neonicotinoid Insecticides in Agriculture* (March 24th, 2014), <http://www.centerforfoodsafety.org/issues/304/pollinators-and-pesticides/reports/2999/heavy-costs-weighing-the-value-of-neonicotinoid-insecticides-in-agriculture>.

² Center for Food Safety, *Comments from Center for Food Safety on the EPA's Preliminary Pollinator Assessment to Support the Registration Review of Imidacloprid (IMD PPA)*, dated Jan. 4, 2016, http://www.centerforfoodsafety.org/files/imd-ppa-41416_cfs_comment_63499.pdf.

³ See Leadership, Center for Food Safety, <http://www.centerforfoodsafety.org/staff> (last visited Sep. 26, 2016).

⁴ See Publications and Resources, Center for Food Safety, <http://www.centerforfoodsafety.org/reports> (last visited Sep. 26, 2016).

⁵ *Supra* note 1.

hundreds of thousands of citizens who petitioned EPA to act upon a CFS formal petition and adopt emergency measures to slow the spread of colony-collapse disorder in honey-bees.⁶ CFS has also delivered to EPA a petition with over half a million signatures urging EPA to follow the European Union's lead in recognizing the risk of neonicotinoid pesticides.⁷ Finally, CFS regularly conveys information in accessible formats to its membership base through "action Alerts" via email.

Federal courts have found that dissemination to 2,500 people through a newsletter and the intent to start a website is sufficient to meet the "reasonably broad audience" factor. *Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005). Moreover, they have found that the proven ability to digest and disseminate highly technical information, as demonstrated by past analysis and dissemination, merits giving nonprofit organizations fee waivers. *See W. Watersheds Project v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004). CFS's activity in these respects far outstrips any minimums established by judicial interpretation.

D. The disclosure is likely to contribute significantly to public understanding of government operations or activities.

The disclosure is likely to contribute significantly to public understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure. 40 C.F.R. § 2.107(l)(2)(iv). As noted above, CFS employs science and policy experts⁸ who have analyzed FOIA, NEPA, and other environmental and scientific reports for their entire careers and who are in a position to digest and present information to the public in a format not otherwise available. CFS puts out reports on pesticides, genetically engineered foods, food and feed additives, and other topics that tend to be difficult for the layperson to understand without professional assistance.⁹ To that end, disclosure will result in an enhanced understanding of the subject matter for the public because the disclosure will facilitate an understanding EPA's regulation of crop seeds coated in neonicotinoids, its application of the "treated article exemption" to those seeds, how EPA assesses the impacts of these seeds, and how EPA communicates this to regulated entities and other regulators. This information is not currently publically available, and CFS has a proven ability to synthesize and analyze technical information from a scientific, legal, and policy standpoints, and to disseminate that information to the public.

⁶ See Press Release, Center for Food Safety, 250,000+ to EPA: Time for Emergency Action on Pesticide to Protect Bees (June 28, 2012), <http://centerforfoodsafety.com/press-releases/713/250000-to-epa-time-for-emergency-action-on-pesticide-to-protect-bees>.

⁷ See Press Release, Center for Food Safety, Half a Million Demand Action from EPA to Save Bees (Mar. 21, 2014), <http://centerforfoodsafety.com/issues/304/pollinators-and-pesticides/press-releases/2995/half-a-million-demand-action-from-epa-to-save-bees>.

⁸ See Leadership, Center for Food Safety, <http://www.centerforfoodsafety.org/staff> (last visited June 24, 2014).

⁹ See Publications & Resources, Center for Food Safety, <http://www.centerforfoodsafety.org/reports> (last visited June 24, 2014).

II. Obtaining the Information is of No Commercial Interest to CFS.

The Center for Food Safety is a 501(c)(3) non-profit environmental advocacy organization that works to address the impacts of our food production system on human health, animal welfare and the environment. CFS works to achieve its goals through grassroots campaigns, public education, media outreach, and litigation. Under FOIA, a commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood. *See e.g.*, OMB Fee Guidelines, 52 Fed. Reg. 10017-18. Such interests are not present in this request. In no manner does CFS seek information from the EPA for commercial gain or interest. CFS respectfully files this FOIA request pursuant to its goal of educating the general public on the adverse effects of industrial agriculture. Upon request and free of charge, CFS will provide members of the public with relevant information obtained from EPA, and as stated previously, CFS is in a position to digest the information and present it in a format understandable to the layperson.

Based upon the foregoing, CFS requests that this FOIA be classified within the EPA's fee waiver category and that EPA send the requested information as required by law.

RESPONDING TO THE REQUEST

As this is a matter of extreme importance to CFS, we look forward to your reply within twenty working days as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(i). If the responsive records are voluminous please contact me to discuss the proper scope and timing of the response. If any exemption from FOIA's disclosure requirement is claimed, please describe in writing, for each individual document, the general nature of the document, all information necessary to substantiate the claimed exemption, and the particular legal basis upon which the exemption is claimed. Please provide any and all non-exempt portions of any document which may be partially exempt due to some privilege as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Should any document be redacted, please indicate the location of the redaction through the use of black ink.

Please send all materials to the Portland address on the letterhead. Please call me at (971) 271-7372 or email me at avansaun@centerforfoodsafety.org if you have any further questions about this request. Thank you for your attention to this request.

Sincerely,



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